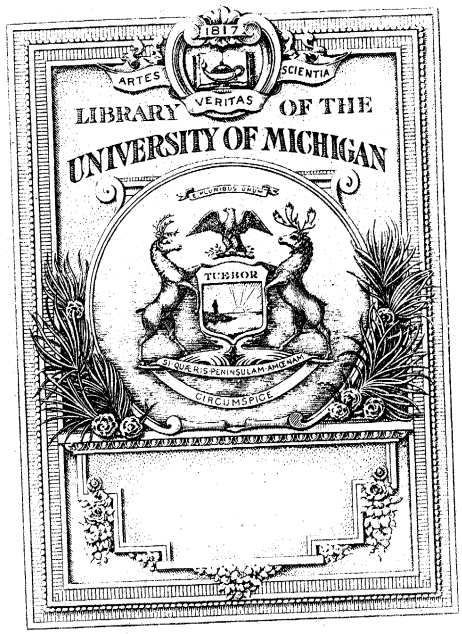
SOME CONSEQUENCES OF THE LAST TREATY OF PARIS ❧ ADVANCES IN INTERNATIONAL LAW AND CHANGES IN NATIONAL POLICY ❧ ❧ ❧ ❧ BY WHITELAW REID



SOME CONSEQUENCES OF THE LAST TREATY OF PARIS
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BY

WHITELAW REID

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SOME CONSEQUENCES OF THE LAST TREATY OF PARIS—ADVANCES IN INTERNATIONAL LAW AND CHANGES IN NATIONAL POLICY. BY WHITELAW REID.

In 1823 Thomas Jefferson, writing from the retirement of Monticello to James Monroe, then President of the United States, said:

"Great Britain is the nation which can do us the most harm of any one on all the earth, and with her on our side we need not fear the world. With her, then, we should most sedulously cherish a cordial friendship, and nothing would tend more to knit our affections than to be fighting once more, side by side, in the same cause."

As these lines are written,[1] the thing which Jefferson looked forward to has come to pass. For the first time under Government orders since British regulars and the militia of the American colonies fought Indians on Lake Champlain, and French at Quebec, the Briton and the American have been fighting side by side, and again against savages. In a larger sense, too, they are at last embarked side by side in the eastern duty, devolved on each, of "bearing the White Man's burden." It seems natural, now, to count on such a friendly British interest in present American problems as may make welcome a brief statement of some things that were settled by the late Peace of Paris, and some that were unsettled.

Whether treaties really settle international law is itself an unsettled point. English and American writers incline to give

[1] The request of Lady Randolph Churchill for the preparation of this article was received just after the British and American forces had their conflict with the natives in Samoa.

them less weight in that regard than is the habit of the great Continental authorities. But it is reasonable to think that some of the points insisted upon by the United States in the Treaty of Paris will be precedents as weighty, henceforth, in international policy as they are now novel to international practice. If not international law yet, they probably will be; and it is confidently assumed that they will command the concurrence of the British Government and people, as well as of the most intelligent and dispassionate judgment on the Continent.

When Arbitration is Inadmissible

The distinct and prompt refusal by the American Commissioners to submit questions at issue between them and their Spanish colleagues to arbitration marks a limit to the application of that principle in international controversy which even its friends will be apt hereafter to welcome. No civilized nation is more thoroughly committed to the policy of international arbitration than the United States. The Spanish Commissioners were able to reinforce their appeal by striking citations from the American record: the declaration of the Senate of Massachusetts, as early as 1835, in favor of an international court for the peaceful settlement of all disputes between nations; the action of the Senate of the United States in 1853, favoring a clause in all future treaties with foreign countries whereby difficulties that could not be settled by diplomacy should be referred to arbitrators; the concurrence of the two houses twenty years later in reaffirming this principle, and at last their joint resolution in 1888 requesting the President to secure agreements to that end with all nations with whom he maintained diplomatic intercourse.

But the American Commissioners at once made it clear that the rational place for arbitration is as a substitute for war, not as a second remedy, to which the contestant may still have a right to resort after having exhausted the first. In the absence of the desired obligation to arbitrate, the dissatisfied nation, according to the American theory, may have, after diplomacy has completely failed, a choice of remedies, but not a double remedy. It may choose arbitration, or it may choose war; but the American Commissioners flatly refused to let it choose war, and then, after defeat, claim still the right to call in arbitrators and put again at risk before them the verdict of war. Arbitration comes before war, they insisted, to avert its horrors; not after war, to afford the defeated party a chance yet to escape its consequences.

The principle thus stated is thought self-evidently sound and

just. Americans were surprised to find how completely it was overlooked in the contemporaneous European discussion; how general was the sympathy with the Spanish demand for arbitration, and how naïf the apparently genuine surprise at their instant and unqualified refusal to consider it. Even English voices joined in the chorus of encouraging approval that, from every quarter in Europe, greeted the formal Spanish appeal for an opportunity to try over in another forum the questions they had already submitted to the arbitrament of arms. The more clearly the American view is now recognized and accepted, the greater must be the tendency in the future to seek arbitration at the outset. To refuse arbitration, when only sought at the end of war, and as a means of escaping its consequences, is certainly to stimulate efforts for averting war at the beginning of difficulties, by means of arbitration. The refusal prevents such degradation of a noble reform to an ignoble end as would make arbitration the refuge, not of those who wish to avoid war, but only of those who have preferred it and been beaten at it. The American precedent should thus become a powerful influence for promoting the cause of genuine international arbitration, and so for the preservation of peace between nations.

When Debt Does Not Follow Sovereignty

Equally unexpected and important to the development of ordered liberty and good government in the world was the American refusal to accept any responsibility, for themselves or for the Cubans, on account of the so-called Cuban debt. The principle asserted from the outset by the American Commissioners, and finally maintained, in negotiating the Peace of Paris, was that a national debt incurred in efforts to subdue a colony, even if called a Colonial Debt, or secured by a pledge of colonial revenues, cannot be attached in the nature of a mortgage to the territory of that colony, so that when the colony gains its independence it may still be held for the cost of the unsuccessful efforts to keep it in subjection.

The first intimations that no part of the so-called Cuban Debt would either be assumed by the United States or transferred with the territory to the Cubans, were met with an outcry from every Bourse in Europe. Bankers, investors, and the financial world in general had taken it for granted that bonds which had been regularly issued by the power exercising sovereignty over the territory, and which specifically pledged the revenues of Custom Houses in that territory for the payment of the interest, and ultimately of the principal, must be recognized. Not to do it, they said, would be bald, unblushing Repudiation — a thing

least to be looked for or tolerated in a Nation of spotless credit and great wealth, which in past times of trial had made many sacrifices to preserve its financial honor untarnished.

It must be admitted that modern precedents were not altogether in favor of the American position. Treaties ceding territory not infrequently provide for the assumption by the new sovereign of a proportional part of the general obligations of the ceding State. This is usually true when the territory ceded is so considerable as to form an important portion of the dismembered country. Even "the great Conqueror of this Century," as the Spanish commissioners exclaimed in one of their arguments, "never dared to violate this rule of eternal justice, in any of the treaties he concluded with those sovereigns whose territories he appropriated, in whole or in part, as a reward for his victories." They cited his first treaty of August 24, 1801, with Bavaria, providing that the debts of the Duchy of Deux-Ponts, and of that part of the Palatinate acquired by France, should follow the countries; and challenged the production of any treaty of Napoleon's or of any modern treaty where the principle of such transfer was violated.

They were able to base an even stronger claim on the precedents of the New World. They were indeed betrayed into some curious errors. One was that the thirteen original States, at the close of the Revolutionary War, paid over to Great Britain £15,000,000 as their share of the public debt. Another was that the payment of the Texas debt by the United States must be a precedent now for its payment of the Cuban debt — whereas the Texas debt was incurred by the Texas insurgents in their successful war for independence, while the Cuban debt was incurred by the mother country in her unsuccessful effort to put down the Cuban insurgents. But as to the Spanish-American republics, they were on solid ground. It was true, and was more to the point than most of their other citations, that every one of these Spanish-American republics assumed its debt; that most of them did it before their independence was recognized, and that they gave these debts contracted by Spain the preference over later debts contracted by themselves. The language of the treaty with Bolivia was particularly sweeping. It assumed as its own these debts of every kind whatsoever, "including all incurred for pensions, salaries, supplies, advances, transportation, forced loans, deposits, contracts and any other debts incurred during war times or prior thereto, chargeable to said treasuries; provided they were contracted by direct orders of the Spanish Government or its constituted au-

thorities in said territories." The Argentine Republic and Uruguay, in negotiating their treaties, expressed the same idea more tersely: "Just as it acquires the rights and privileges belonging to the Crown of Spain, so it also assumes all the duties and obligations of the Crown."

The argument was certainly obvious and at first sight seemed fair that what every other revolted American colony of Spain had done, on gaining its independence, the last of the long line should also do. But an examination shows that in no case were the circumstances such as to make it a fair precedent for Cuba. In the other colonies, the debts to a considerable extent had been incurred for the prosecution of improvements of a pacific character, generally for the public good and often at the public desire. Another part had been spent in the legitimate work of preserving public order and extending the advantages of government over wild regions and native tribes.[1] The rich, compact, populous island of Cuba had called for no such loans, up to the time when Spain had already lost all of her American colonies on the Continent, and had consequently no other dependency on which to fasten its exacting Governor-Generals and hosts of other official leeches. There was no Cuban debt. Any honest administration had ample revenues for all legitimate expenses, and a surplus; and this surplus seems not to have been used for the benefit of the island, but sent home. Between 1856 and 1861 over $20,000,000 of Cuban surplus were thus remitted to Madrid. Next began a plan for using Cuban credit as a means of raising money to reconquer the lost dominions; and so "Cuban bonds" (with the guarantee of the Spanish Nation) were issued, first for the effort to regain Santo Domingo, and

[1] One of the author's colleagues at Paris, the Honorable Cushman K. Davis, Chairman of the Foreign Relations Committee of the United States Senate, and among the most scholarly students of International Law now in American public life, says in a private letter:

"I was at first very much struck by the unanimity of action by the South American republics in the assumption of debts created by Spain. But some reflection upon the subject has caused that action to lose, to me, much of its apparent relevancy. There was, in none of those cases, any funded debt, in the sense of bond obligations, held in the markets of the world. There were two parties in the various Spanish provinces of North and South America, one of which supported Spanish ascendancy, and the other of which was revolutionary. The debts created by the exactions of Spain and of the revolutionary party alike were, mainly if not entirely, obligations due to the people of the colonies themselves. As to the continuance of pensions, endowments, etc., it must be remembered that these were Catholic countries, and that these obligations ran to a State Church, which continued to be a State Church after the colonies had achieved their independence. As to the Napoleonic treaties, cited by the Spanish Commissioners, they were mere matters of covenant in a special case, and were not, in my judgment, the result of any anterior national obligation."

then for the expedition to Mexico. By 1864 $3,000,000 had been so issued; by 1868 $18,000,000 — not at the request or with the consent of the Cubans, and not for their benefit. Then commenced the Cuban insurrection; and from that time on all Spain could wring from Cuba or borrow in European markets on the pledge of Cuban revenues and her own guarantee, went in the effort to subdue a colony in revolt against her injustice and bad government. The lenders knew the facts and took the risk. Two years after this first insurrection was temporarily put down these so-called Cuban debts had amounted to over $170,000,000. They were subsequently consolidated into other and later issues; but, whatever change of form or date they underwent, they continued to represent practically just three things, the effort to conquer Santo Domingo, the expedition to Mexico and the efforts to subdue Cuba. A movement to refund at a lower rate of interest was begun in 1890, and for this purpose an issue of $175,000,000 of Spanish bonds was authorized, to be paid out of the revenues of Cuba, but with the guarantee of the Spanish Nation. Before many had been placed the insurrection had again broken out. Thenceforward they were used not to refund old bonds, but to raise money for the prosecution of the new war. Before its close this indebtedness had been swollen to over double the figure named above, and a part of the money must have been used directly in the war against the United States.

In the negotiations, Spain took high moral ground with reference to these debts. She utterly denied any right to inquire how the proceeds had been expended. She did not insist for her own benefit on their recognition and transfer with the territory. She was concerned not for herself, but for international morality and for the innocent holders. Some, no doubt, were Spanish citizens, but many others were French, or Austrian, or of other foreign nationalities. The bonds were freely dealt in on the Continental Bourses. A failure to provide for them would be a public scandal throughout civilization; it would cause a widespread and profound shock to the sense of security in national obligations the world over, besides incalculable injustice and individual distress.

But the fact was that these were the bonds of the Spanish Nation, issued by the Spanish Nation for its own purposes, guaranteed in terms "by the faith of the Spanish Nation," and with another guarantee pledging Spanish sovereignty and control over certain colonial revenues. Spain failed to maintain her title to the security she had pledged, but the lenders knew

the instability of that security when they risked their money on it. All the later lenders and many of the early ones knew, also, that it was pledged for money to continue Spain's efforts to subdue a people struggling to free themselves from Spanish rule. They may have said the morality or justice of the use made of the money was no concern of theirs. They may have thought the security doubtful, and still relied on the broad guarantee of the Spanish Nation. At any rate, *Caveat emptor!* The one thing they ought not to have relied upon was that the island they were furnishing money to subdue, if it gained its freedom, would turn around and insist on reimbursing them!

The Spanish contention that it was in their power, as absolute sovereign of the struggling island, to fasten ineradicably upon it, for their own hostile purposes, unlimited claims to its future revenues would lead to extraordinary results. Under that doctrine, any hard pushed oppressor would have a certain means of subduing the most righteous revolt and condemning a colony to perpetual subjugation. He would only have to load it with bonds, issued for his own purposes, beyond any possible capacity it could ever have for payment. Under that load it could neither sustain itself independently, even if successful in war, nor persuade any other Power to accept responsibility for and control over it. It would be rendered impotent either for freedom or for any change of sovereignty. To ask the Nation, sprung from the successful revolt of the Thirteen Colonies, to acknowledge and act on an immoral doctrine like that, was, indeed, ingenuous — or audacious. The American Commissioners pronounced it alike repugnant to common sense and menacing to liberty and civilization. The Spanish Commissioners resented the characterization; but it is believed that the considerate judgment of the world will yet approve it. International practice will certainly hesitate hereafter, in transfers of sovereignty over territory after its successful revolt, at any recognition of loans negotiated by the ceding power in its unsuccessful effort to subdue the revolt — no matter what pledges it had assumed to give about the future territorial revenues. Loans for the prosecution of unjust wars will be more sharply scrutinized in the money markets of the world, and will find less ready takers, however extravagant the rates. It may even happen that oppressing nations, in the increasing difficulty of floating such loans, will find it easier to relax the rigors of their rule and promote the orderly development of more liberal institutions among their subjects.

Far from being an encouragement, therefore, to repudiation,

the American rejection of the so-called Cuban debt was a distinct contribution to international morality, and will probably furnish an important addition to international law.

Ready to Pay Legitimate Colonial Debts

At the same time the American Commissioners made clear in another case their sense of the duty to recognize any debt legitimately attaching to ceded territory. There was not the remotest thought of buying the Philippines, when a money payment was proposed, in that branch of the negotiations. When the Spanish fleet was sunk and the Spanish army captured at Manila, Spanish control over the Philippines was gone; and the power that had destroyed it was compelled to assume its responsibilities to the civilized world at that commercial centre and on that oceanic highway.[1] If that was not enough reason for the retention of the Philippines, then at any rate the right of the United States to them as indemnity for the war could not be contested by the generation which had witnessed the exaction of Alsace and Lorraine, *plus* $1,000,000,000 indemnity, for the Franco-Prussian War. The war with Spain had already cost the United States far above $300,000,000. When trying to buy Cuba from Spain, in the days of that island's greatest prosperity, the highest valuation the United States was ever willing to attach to it was $125,000,000. As an original proposition, nobody dreams that the American people would have consented to buy the remote Philippines at that figure or at the half of it. Who could think the Government exacting, if it accepted them in lieu of a cash indemnity (which Spain was wholly incapable of paying) for a great deal more than double the value it had put upon Cuba, at its very doors?

It was certain then that the Philippines would be retained, unless the President and his Commissioners so construed their duty to protect their country's interests as to throw away, in advance of popular instruction, all possible chance of indemnity for the war. But there was an issue of Spanish bonds, called a Philippine loan, amounting to forty million dollars Mexican, or say about eighteen millions of American money. Warned by the results of inquiry as to the origin of the Cuban debt, the

[1] It might, of course, have run away and left them to disorder. That is what a pirate could have done; and would have compelled the intervention of European Governments for the protection of their own citizens. Or it might have restored them to Spain. Besides the desertion of natives whose aid against Manila had been encouraged, that would have been to say that while the United States went to war because the injustice and barbarity of Spanish rule in the West Indies were such that they could no longer be tolerated, it was now so eager to quit and get peace that it was willing to re-establish that same rule in the East Indies!

American Commissioners avoided undertaking to assume this *en bloc.* But in their first statement of the claim for cession of sovereignty in the Philippines, they were careful to say that they were ready to stipulate "for the assumption of any existing indebtedness of Spain, incurred for public works and improvements of a pacific character in the Philippines." Not till they learned that of this entire "Philippine debt" (only issued in 1897) over one fourth had actually been transferred to Cuba to carry on the war against the Cuban insurgents, and finally against the United States, and that the most of the balance had probably been used in prosecuting the war in Luzon, did the American Commissioners abandon the idea of assuming it. Even then they resolved, in the final transfer, to fix an amount at least equal to the face value of that debt, which could be given to Spain as an acknowledgment for any pacific improvements she might ever have made there, not paid for by the revenues of the islands themselves. She could use it to pay the Philippine bonds if she chose.[1] That was the American view as to the sanctity of public debt legitimately incurred in behalf of ceded territory; and that is an explanation of the money payment in the case of the Philippines, as well as of the precise amount at which it was finally fixed.

Privateering

Neither the Peace of Paris nor the conflict which it closed can be said to have quite settled the status of private war at sea. "Privateering is and remains abolished," not in international law, but merely between the Powers that signed that clause in the Declaration of Paris in 1856. But the greatest commercial nation, as well as the most powerful, that withheld its signature was the United States. Obviously its adhesion to the principle would bring more weight to the general acceptance among civilized nations, which is the essential for admission in international law, than that of all the other dissenting nations.

Under these circumstances, the United States took the occasion of an outbreak of war between itself and another of the dissenting nations to announce that, for its part, it did not intend, under any circumstances, to resort to privateering. The other gave no such assurance, and was in fact expected to commission privateers at an early day; but the disasters to its navy

[1] Nothing further, however, was said (to Spain) about the Philippine debt, and no specific reason for the payment was given in the ultimatum. The Commissioners merely say they "now present a new proposition, embodying the concessions which, for the sake of immediate peace, their Government is, under the circumstances, willing to tender."

and the collapse of its finances left it without a safe opportunity. The moral effect of this volunteer action of the United States, with no offset of any active dissent by its opponent, becomes almost equivalent to completing that custom and assent of the civilized world which create international law. Practically all governments are likely henceforth to regard privateering as under international ban, and no one of the States yet refraining from assent, Spain, Mexico, Venezuela or China, is likely to defy the ban. The announcement of the United States may probably be accepted as marking the end of private war at sea, and a genuine advance in the world's civilization.

Exempt all Private Property

The refusal of the United States in 1856 to join in abolishing privateering was avowedly based upon the ground that it did not go far enough. The American claim was that not only private seizure of enemy's goods at sea should be prohibited, but that all private property of the enemy at sea should be entitled to the same protection as on land — prizes and prize courts being thus almost abolished and no private property of the enemy anywhere being liable to confiscation, unless contraband of war. It was frankly stated at the time that without this addition the abolition of privateering was not in the interest of Powers like the United States, with a small navy but a large and active merchant fleet. This peculiar adaptability of privateering to the situation of the United States might have warranted the suspicion that its professions of a desire to make the article in the Declaration of Paris broader than the other nations wished only masked a desire to have things remain as they were.

But the subsequent action of its Government in time of profound peace compelled a worthier view of its attitude. A treaty with Italy, negotiated by George P. Marsh and ratified by the United States in 1871, embodied the very extension of the Declaration of Paris for which the United States contended. This treaty provides that "in the event of a war between them (Italy and the United States) the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure, on the high seas or elsewhere, by the armed vessels or by the military forces of either party." Is it too much to hope that this early committal of the United States with Italy, and its subsequent action in the war with Spain, may at last bring the world to the advanced ground it recommended for the Declaration of Paris, and throw the safeguards of civilization henceforth around all private property in time of war, whether on land or sea?

Here, then, are three great principles, important to the advancement of civilization, which, if not established in international law by the Peace of Paris and the war it closed, have at least been so powerfully reinforced that no nation is likely hereafter lightly or safely to violate them.

The Monroe Doctrine Stands

But it has often been asked, and sometimes by eminent English writers, whether the Americans have not at the same time fatally unsettled the Monroe Doctrine, which never, indeed, had the sanction of international law, but to which they were known to attach the greatest importance. A large and influential body of American opinion at first insisted that the acquisition of the West Indian, Philippine and Sandwich Islands constituted an utter abandonment of that doctrine; and apparently most European publicists have accepted this view. Only slight inquiry is needed to show that the facts give it little support.

The Monroe Doctrine sprang from the union of certain absolute monarchs (claiming to rule not by the will of the people, but "by divine right,") in a Holy Alliance against that dangerous spread of democratic ideas, which, starting in the revolt of the American colonies, had kindled the French Revolution and more or less unsettled government in Europe. It was believed that these monarchs meant, not only to repress republican tendencies in Europe, but to assist Spain in reducing again to subjection American republics which had been established in former Spanish colonies, and had been recognized as independent by the United States. Under these circumstances, James Monroe, then President, in his annual message, in 1823, formally announced the famous "doctrine" in these words:

> "The occasion has been deemed proper for asserting as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintained, are henceforth not to be considered as subjects for future colonization by any European Powers. . . . Our policy in regard to Europe . . . is not to interfere in the internal concerns of any of its Powers."

That is the whole substance of it. There was no pledge of abstention throughout the future and under all circumstances from the internal concerns of European Powers — only a statement of present practice. Far less was there a pledge, as seems to have been widely supposed, that if the Holy Alliance would only refrain from aiding Spain to force back the Mexican and South American republics into Spanish colonies, the United States would refrain from extending its institutions or its con-

trol over any region in Asia or Africa or the islands of the sea. Less yet was there any such talk, as has been sometimes quoted, about keeping Europe out of the Western Hemisphere and itself staying out of the Eastern Hemisphere. What Mr. Monroe really said, in essence, was this: "The late Spanish colonies are now American republics, which we have recognized. They shall not be reduced to colonies again; and the two American continents have attained such an independent condition that they are no longer fields for European colonization." That fact remains. It does not seem probable that anybody will try or wish to change it. Furthermore, the United States has not interfered in the internal concerns of any European Powers. But it is under no direct pledge for the future to that effect; and as to Asia, Africa and the islands of the sea, it is and always has been as free as anybody else. It encouraged and protected a colony on the West Coast of Africa. It acquired the Aleutian Islands, largely in the Asiatic system. It long maintained a species of protectorate over the Sandwich Islands. It acquired an interest in Samoa and joined there in a protectorate. It has now taken the Sandwich Islands and the Philippines. Meanwhile the Monroe Doctrine remains just where it always was. Nothing has been done in contravention of it, and it stands as firmly as ever, though with the tragic end of the Franco-Austrian experiment in Mexico, and now with the final disappearance from the Western world of the unfortunate Power whose colonial experiences led to its original promulgation, the circumstances have so changed that nobody is very likely to have either interest or wish to interfere with it.

Leaving the Continent

What has really been unsettled, if anything, by the Peace of Paris, and the preceding war, has been the current American idea as to the sphere of National activities, and the power under the Constitution for their extension. It is perfectly true that the people did not wish for more territory, and never dreamed of distant colonies. There had always been a party that first opposed and then belittled the acquisition of Alaska. There was no considerable popular support since the Civil War for filibustering expeditions of the old sort against Cuba. There was genuine reluctance to take the steps which recent circumstances and the National committals for half a century made almost unavoidable in the Sandwich Islands. Now suddenly the United States found itself in possession of Cuba, Porto Rico, Guam and the Philippines. The first impression was one of great popular perplexity. What was to be done with them? Must they be de-

veloped through the territorial stage into independent States in the Union; or, if not, how govern or get rid of them? What place was there in the American system for territories that were never to be States, for colonies, or for the rule of distant subject races?

Up to this time, from the outbreak of the war, the Administration had found the American people united in its support as they had hardly been united for a century. The South vied with the North, the West forgot the growing jealousy of the East, the poor the new antagonism to the rich, and the wildest cowboys from Arizona and New Mexico marched fraternally beside scions of the oldest and richest families from New-York, under the orders of a great secessionist cavalry general.

But now two parties presently arose. One held that there was no creditable escape from the consequences of the war; that the Government having broken down the existing authority in the capital of the Philippines, and, practically, throughout the archipelago, could neither set up that authority again nor shirk the duty of replacing it; that it was as easy and as constitutional to apply some modification of the existing territorial system to the Philippines as it had been to Alaska and the Aleutians, and that, while the task was no doubt disagreeable, difficult and dangerous, it could not be avoided with honor, and would ultimately be attended with great profit. On the other hand, some prominent members of the Administration party led off in protests against the retention of the Philippines on constitutional, humanitarian and economic grounds, pronouncing it a policy absolutely antagonistic to the principles of the Republic and the precursor of its downfall. In proportion as the Administration itself inclined to the former view, the opposition leaders fell away from the support they had given during the war, and began to align themselves with the members of the Administration party who had opposed the ratification of the treaty They were reinforced by a considerable body of educated and conservative public opinion, chiefly at the East, and by a number of trades-union and labor leaders, who had been brought to believe that the new policy meant cheap labor and cheap manufactures in competition with their own, together with a large standing army, to which they have manifested great repugnance ever since the Chicago riots.

Anti-Administration View of the Constitution

In the universal ferment of opinion and discussion that ensued, the opponents of what is assumed to be the Administration policy on the new possessions have seemed to rely chiefly on two provisions in the Constitution of the United States and

a phrase in the Declaration of Independence. The constitutional provisions are:

"The Congress shall have power to levy and collect taxes . . . and provide for the common defence and general welfare of the United States; *but all duties, imposts and excises shall be uniform throughout the United States.*"—Art. I, Sec. 8.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."—Art. XIV, Sec. 1.

To serve the purpose for which these clauses of the constitution are invoked, it is necessary to hold that any territory to which the United States has a title is an integral part of the United States; and perhaps the greatest name in the history of American constitutional interpretation is cited in favor of that contention. In the early part of the century Mr. Chief Justice Marshall, of the Supreme Court of the United States, decided the case of a citizen of the District of Columbia who refused to pay his share of a direct tax, originally assessed by Congress in January, 1815, on the eighteen States then in existence, and by another act, passed the next month, extended proportionally over the District of Columbia. In this case (Loughborough vs. Blake, 5 Wheaton, 319), the Chief Justice argued that the term "the United States" in the first clause of the Constitution above quoted necessarily included the Territories. He said:

"Does this term designate the whole or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great Republic, which is composed of States and Territories. The District of Columbia or the territory west of the Missouri is not less within the United States than Maryland or Pennsylvania."

If this is accepted as a binding constitutional interpretation, it follows that when the treaty ceding Spanish sovereignty in the Philippines was ratified that archipelago became an integral part of the United States. Then, under the first clause above cited, the Dingley tariff must be immediately extended over the Philippines (as well as Porto Rico, the Sandwich Islands and Guam) precisely as over New-York; and, under the second clause, every native of the Philippines and the other new possessions is a citizen of the United States, with all the rights and privileges thereby accruing. The first result would be the disorganization of the present American revenue system by the free admission into all American ports of sugar and other tropical products from the greatest sources of supply, and the consequent loss of nearly sixty millions of annual revenue. An-

other would be the destruction of the existing cane and beet sugar industries in the United States. Another, apprehended by the laboring classes, who are already suspicious from their experience with the Chinese, would be an enormous influx either of cheap labor or of its products, to beat down their wages.

Next, it is argued, there is no place in the theory or practice of the American Government for territories except for development into Statehood; and consequently, the required population being already present, new States must be created out of Luzon, Mindanao, the Visayas, Porto Rico and the Sandwich Islands. The right to hold them permanently in the territorial form, or even under a protectorate, is indignantly denied as conflicting with Mr. Jefferson's phrase in the Declaration of Independence to the effect that governments derive their just powers from the consent of the governed. Some great names can certainly be marshalled in support of such views. Thus, Chancellor Kent said, in 1823, with reference to the proposed colonization of the Columbia River country, that a government by Congress as absolute sovereign over colonies absolute dependents, was not congenial to the free and independent spirit of American institutions. John C. Calhoun in 1848 introduced a resolution in the Senate saying that the conquest and retention of Mexico, "either as a province or to incorporate it in the Union, would be a departure from the settled policy of the Government, in conflict with its character and genius, and in the end subversive of our free and popular institutions." Mr. Chief Justice Taney, of the United States Supreme Court, said, in his opinion giving the decision in the Dred Scott case, that a power "to rule territory without restriction as a colony or dependent province would be inconsistent with the nature of our Government." Denial of this duty to admit the new possessions as States is denounced as a violation by the Republic of the very law of its being, and its transformation into an empire; as a revival of slavery in another form, both because of government without representation, and because no tropical colony can be successful without contract labor; as a consequent and inevitable degradation of American character; as a defiance of the warnings in Washington's Farewell Address against foreign entanglements; as a repudiation of the Congressional declaration at the outbreak of the war that it was not waged for territorial aggrandizement; and finally as placing Aguinaldo in the position of fighting for freedom, independence and the principles of the fathers of the Republic, while the Republic itself is in the position of fighting to control and govern him and his people in spite of their will.

Treaty View of the Constitution

On the other hand, the supporters of the treaty and of the policy of the Administration, so far as it has been disclosed, begin their argument with another provision of the Constitution, the second part of Section 3 in Article IV:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

They claim that, under this, Congress has absolute power to do what it will with the Philippines, as with any other territory or other property which the United States may acquire. It is admitted that Congress is of course under an implied obligation to exercise this power in the general spirit of the Constitution which creates it and of the Government of which it is a part. But it is denied that Congress is under any obligation to confer a republican form of government upon a territory whose inhabitants are unfit for it, or to adopt any form of government devised with reference to preparing it for ultimate admission to the Union as a State. The clause in consideration was drafted by Gouverneur Morris. Fifteen years after the adoption of the Constitution, in answer to a question as to the precise meaning of this clause, he wrote:

"Your inquiry substantially is whether Congress can admit as a new State territory which did not belong to the United States when the Constitution was made. In my opinion they cannot. I always thought, when we should acquire Canada and Louisiana, it would be proper to govern them as provinces and allow them no voice in our councils. In wording the third section of the fourth article I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief that had it been more pointedly expressed a strong opposition would have been made." (3 Morr. Wr. 192.)

By whom? Obviously by those who wanted to strain the clause — not still further *toward* exclusion (which was recognized as its natural tendency), but *against* exclusion, for the sake of leaving admission as States still possible for such acquisitions as Louisiana. The objection to a "more pointed expression" thus sprang not from doubt as to the power of exclusion, but only from a desire that the power of admission should not be absolutely and in terms withheld.

It is further denied that Congress is under any obligation, arising either from the Constitution itself or from the precedents of the Nation's action under it, to ask the consent of the inhabitants in acquired territory to the form of government which may be given them. It is curious to observe that Mr. Chief Justice

Marshall himself appears to have inclined to this view. In deciding a case growing out of the acquisition of Florida from Spain (Am. Ins. Co. vs. Canter, I Pet. 511), the Chief Justice said that the inhabitants of Florida, though made citizens of the United States by the treaty of cession from Spain, acquired no right to share in political power. A more striking fact is that Mr. Jefferson himself felt under no obligations to ask the consent of the Spanish and French people of Louisiana, when he purchased that territory from Napoleon. Neither did Mr. Lincoln ask the consent of the inhabitants before he peremptorily required South Carolina and the other seceding States to abandon the government they had set up, and submit to that against which they had revolted; nor did any President, in the case of any territory whatever which the United States has ever acquired and ruled throughout the whole period of its history.

Still further, it is insisted not only that Congress is under no obligations to prepare these territories for Statehood, or admit them to it, but that, at least as to the Philippines, it is prevented from doing so by the very terms of the preamble to the Constitution itself — concluding as it does with the words "do ordain and establish this Constitution for the United States *of America*." There is no place here for States of Asia.

Replies to Constitutional Objections

In dealing with the arguments against retention of the Philippines, based on the sections previously quoted from Articles I and XIV of the Constitution, the friends of the policy say that the apparent conflict in these articles with the wide grant of powers over territory to Congress which they find in Article IV arises wholly from a failure to recognize the different senses in which the term "the United States" is used. As the name of the Nation it is often employed to include all territory over which United States sovereignty extends, whether originally the property of the individual States and ceded to the United States, or whether acquired in treaties by the Nation itself. But such a meaning is clearly inconsistent with its use in certain clauses of the Constitution in question. Thus Article XIII says: "Neither slavery nor involuntary servitude . . . shall exist within the United States *or any place subject to their jurisdiction*." The latter clause was obviously the constitutional way of conveying the idea about the Territories, which the opponents of the Philippine policy are now trying to read into the name "United States." The constitutional provision previously cited about citizenship illustrates the same point.

It says "all persons born, etc., are citizens of the United States *and of the State wherein they reside.*" There is no possibility left here that Territories are to be held as an integral part of the United States, in the sense in which the Constitution uses the name. If they had been, the latter clause would have read "and of the State *or Territory* in which they reside."

The contrary interpretation, which has already been mentioned, given early in the century by Mr. Chief Justice Marshall, is met first by the admitted fact that his opinion as quoted is not a decision of the Court, but merely a *dictum*, possibly hasty, of the Chief Justice himself. It is next shown that, very soon afterward, in a case already referred to, argued by Daniel Webster before the same Chief Justice, an almost exactly opposite opinion was maintained by Mr. Webster, that the Chief Justice took no exception to it, and that the case was decided in Mr. Webster's favor without reference to the previous case, or to the Chief Justice's previous and conflicting utterances. In this argument Mr. Webster said:

"What is Florida? It is no part of the United States. How can it be? How is it represented? Do the laws of the United States reach Florida? Not unless by particular provisions. The Territory and all within it are to be governed by the acquiring power, except where there are reservations by the treaty. . . . Florida was to be governed by Congress as she thought proper. What has Congress done? She might have done anything — she might have refused a trial by jury and refused a legislature." (Am. Ins. Co. vs. Canter, I Pet. 511.)

Twenty years later, in the United States Senate, Mr. Webster again took similar ground, maintaining that the Constitution had no operation in the Territories until acts of Congress were passed to put it in force — that it was made for States and not for territorial possessions. Thomas H. Benton said substantially the same thing, both in the Senate and afterward in his "Thirty Years' View" (Vol. II, page 714). Mr. Justice Matthews, of the Supreme Court of the United States, put the same view with great clearness in his opinion in one of the Utah polygamy cases:

"The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion they are represented by the Government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution or are necessarily implied in its terms, and in the purposes and objects of the power itself. . . . It rests with Congress to say whether in a given case any of the people resident in the Territory shall participate in the election of its officers or the making of its laws, and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or

abridge it, as it may deem expedient. . . . The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty, which restrain all the agencies of government, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the United States." (Murphy vs. Ramsey, 114 U. S., 44, 45.)

And finally, to take the latest authoritative judicial construction of constitutional powers throughout any territories the United States may possess, Mr. Justice Morrow, of California, of the United States Circuit Court of Appeals, in 1898, in giving the opinion of the Court on a case arising in Alaska, said:

"The answer to these and other like objections urged in the brief of counsel for the defendant is found in the now well established doctrine that the Territories of the United States are entirely subject to the legislative authority of Congress. They are not organized under the Constitution, nor subject to its complex distribution of the powers of government as the organic law, but are the creation, exclusively, of the legislative department and subject to its supervision and control. The United States, having rightfully acquired the Territories, and being the only Government which can impose laws upon them, has the entire dominion and sovereignty, National and municipal, Federal and State." (U. S. Appeals, Vol. 57, p. 6.)

It has been thought best, in an explanation to readers in another country of the perplexity arising in the American mind, in a sudden emergency, from these disputed points in constitutional powers, to set forth with impartial fairness and some precision the views and authorities on either side. It is essential to a fair judgment as to the apparent hesitation since this problem began to develop, that the real basis for the conflicting opinions should be understood, and that full justice should be done to the earnest repugnance with which many conscientious citizens draw back from sending American youth to distant tropical regions to enforce with an armed hand the submission of an unwilling people to the absolute rule of the Republic. It should be realized, too, how far the new departure does unsettle the practice and policy of a century. The old view that each new Territory is merely another outlet for surplus population, soon to be taken in as another State in the Union, must be abandoned. The old assumption that all native inhabitants of territory belonging to the United States are to be regarded as citizens is gone. The idea that government anywhere must derive its just powers only from the consent of the governed is unsettled, and thus, to some, the very foundations of the Republic seem to be shaken. Three generations, trained in Washington's warnings against foreign entanglements, find it difficult all at once to realize that advice adapted to a people of three

millions, scattered along the border of a continent, may need some modifications when applied to a people of seventy-five millions, occupying the continent, and reaching out for the commerce of both the oceans that wash its shores.

But whatever may be thought of the weight of the argument, either as to constitutional power or as to policy, there is little doubt as to the result. The people who found authority in their fundamental law for treating paper currency as a legal tender in time of war, in spite of the constitutional requirement that no State should "make anything but gold and silver coin a tender in payment of debts," will find there also all the power they need for dealing with the difficult problem that now confronts them. And when the constitutional objections are surmounted, those as to policy are not likely to lead the American people to recall their soldiers from the fields on which the Filipinos attacked them, or abandon the sovereignty which Spain ceded. The American Government has the new territories, and will hold and govern them.

A republic such as the United States has hitherto not been well adapted to that sort of work. Congress is apt to be slow, if not also changeable, and under the Constitution the method of government for territories must be prescribed by Congress. It has not yet found time to deal with the Sandwich Islands. Its harsher critics declare it has never yet found time to deal fairly with Alaska. No doubt Executive action, in advance of Congress, might be satisfactory; but a President is apt to wait for Congress unless driven by irresistible necessities. He can only take the initiative through some form of military government. For this the War Department is not yet well organized. Possibly the easiest solution for the moment would be in the organization of another department for war and government beyond the seas; or the development of a measurably independent bureau for such work in the present Department. Whatever is done, it would be unreasonable to expect unbroken success or exemption from a learner's mistakes and discouragements. But whoever supposes that these will result either in the abandonment of the task or in a final failure with it, does not know the American people.